Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

THOMAS J. ORR,

Petitioner,

vs.

RONALD J. YUHAS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether through 11 U.S.C. § 541(c) the existence of a legally enforceable restriction on the transfer of an I.R.A., being N.J.S.A. 25:2-1, acts to exclude that I.R.A. from a debtor's bankruptcy estate no matter how limited or partial the nature of the restriction.

2. Whether a debtor's ability to liquidate an I.R.A. at will is an interest which is an asset of his bankruptcy estate and therefore accessible by the Trustee in his authority to act in place of the debtor not withstanding that applicable non-bankruptcy law exempts the I.R.A. from the claims of the debtor's creditors.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	3
Reasons for Granting the Writ	4
I. Proper Statutory Interpretation Of 11 U.S.C. § 541(c) Mandates A Holding That A Trust Subject To An Enforceable Restriction On Transfer Is Property Of The Estate Subject To The Terms Of That Restriction.	7
II. Respondent's Right To Voluntarily Liquidate His I.R.A. Is Not Restricted By N.J.S.A. 25:2-1 And Is Therefore Property Of The Estate Accessible By The Trustee.	10
III. Sound Bankruptcy Policy Requires A Holding That A Self-Settled Revocable Trust Not Be	

Contents

Page

Excluded From A Debtor's Bankruptcy Estate Under 11 U.S.C. § 541(c)(2). 13

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Aronsohn & Springstead v. Weissman, 230 N.J. Super. 63, 552 A.2d 649 (N.J. Super. Ct. App. Div.), *cert. denied,* 117 N.J. 36, 563 A.2d 808 (1989) 13

Drewes v. Schonteich, 31 F.3d 674 (8th Cir. 1994) ... 5

In Re Bresnahan, 183 B.R. 506 (Bkrtcy. S.D. Ohio 1995) 5

In Re Brewer, 154 B.R. 209 (Bkrtcy. W.D. Pa. 1993) . 5

In Re Cathcart, 203 B.R. 599 (Bkrtcy. E.D. Va. 1997) 12

In Re Conner, 73 F.3d 258 (9th Cir. 1996) 5

In Re Craig, 204 B.R. 756 (D. N.D. 1997) 6

In Re Delnero, 191 B.R. 539 (Bkrtcy. N.D. N.Y. 1992) 6

In Re Denton, 169 B.R. 608 (Bkrtcy. W.D. Tex. 1994) 6

Contents

	Page
In Re Dow, 132 B.R. 853 (Bkrtcy. S.D. Ohio 1991) ..	12
In Re Harless, 187 B.R. 719 (Bkrtcy. N.D. Ala. 1994)	6
In Re Houck, 181 B.R. 187 (Bkrtcy. E.D. Pa. 1995) ..	5, 12
In Re Lamb, 179 B.R. 419 (Bkrtcy. D. N.J. 1994) ...	5
In Re McClellan, 152 B.R. 252 (Bkrtcy. C.D. Ill. 1993), *aff'd*, 162 B.R. 525, *rev'd*, 45 F.3d 432	6
In Re Meehan, 102 F.3d 1209 (11th Cir. 1997)	5
In Re Silviera, 186 B.R. 168 (Bkrtcy. D. Mass. 1995)	6
In Re Slepian, 170 B.R. 712 (Bkrtcy. S.D. Ala. 1994)	6
In Re Solomon, 67 F.3d 1128 (4th Cir. 1995)	5
In Re Van Nostrand, 183 B.R. 82 (Bkrtcy. D. N.J. 1995)	5
In Re Watson, 192 B.R. 238 (Bkrtcy. D. Nev. 1996) ..	6
In Re Yuhas, 186 B.R. 381 (Bkrtcy. D. N.J. 1995) ..	5, 6, 7, 8
Matter of Fink, 153 B.R. 883 (Bkrtcy. D. Neb. 1993)	6

Contents

Page

Patterson v. Shumate, 504 U.S. 753 (1992) .. 4, 5, 6, 7, 8, 11

Whetzal v. Alderson, 32 F.3d 1302 (8th Cir. 1994) ... 5

Statutes Cited:

11 U.S.C. § 522(d)(10)(E) 15, 16

11 U.S.C. § 541 ..... 1, 11, 12, 14, 15, 16

11 U.S.C. § 541(c) ..... i, 4, 5, 6, 7, 8, 10, 11

11 U.S.C. § 541(c)(1) 7, 8, 9

11 U.S.C. § 541(c)(2) 7, 8, 9, 11, 12, 13, 16

11 U.S.C. § 704 12

28 U.S.C. § 1254(1) 1

N.J.S.A. 25:2-1 ..... i, 1, 2, 4, 10, 11, 12, 14, 15, 17

N.J.S.A. 25:2-1(b) 10

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Third Circuit Filed January 22, 1997 ..... 1a

Contents

	Page
Appendix B — Judgment of the United States Court of Appeals for the Third Circuit Dated January 22, 1997	12a
Appendix C — Order of the United States Court of Appeals for the Third Circuit Dated February 26, 1997	14a
Appendix D — Opinion and Order of the United States District Court, District of New Jersey Filed February 27, 1996	16a
Appendix E — Memorandum Opinion of the United States Bankruptcy Court, District of New Jersey Filed September 15, 1995	24a
Appendix F — Order of the United States Bankruptcy Court, District of New Jersey Filed September 29, 1995	37a
Appendix G — Relevant Statutes	39a

Petitioner Thomas J. Orr, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 104 F.3d 612 and is reproduced in the Appendix filed herewith at 1a. The unreported opinion of the District Court is reproduced in the Appendix at 16a. The opinion of the Bankruptcy Court is reported at 186 B.R. 381 and is reproduced in the Appendix at 24a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Code, 11 U.S.C. § 541, and the pertinent part of the New Jersey Fraudulent Conveyances Act, N.J.S.A. 25:2-1 are as set forth below:

11 U.S.C. § 541 Property of the estate

> (a) The commencement of a case . . . creates an estate. Such an estate is comprised of all the following property. . . .
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(c)(1) Except as provided in paragraph (2) of this subsection, an interest in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law —

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before the commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

N.J.S.A. 25:2-1. Conveyances of personal property in trust for use of persons making them void as to creditors

a. Except as provided in subsection b. of this section, . . . every conveyance . . . made

in trust for the use of the person making the same, shall be void as against creditors.

b. Notwithstanding the provisions of any other law to the contrary, any property held in a qualifying trust and any distributions from a qualifying trust, regardless of the distribution plan elected for the qualifying trust, shall be exempt from all claims of creditors and shall be excluded from an estate in bankruptcy, except that:

(1) no exemption shall be allowed . . . for fraudulent conveyances. . . .; and

(2) no qualifying trust shall be exempt from the claims under any order for child support or spousal support. . . .

For purposes of this section, a "qualifying trust" means a trust created or qualified and maintained pursuant to federal law, including, but not limited to, sections 401, 403, 408, or section 409 of the federal Internal Revenue Code of 1986 (26 U.S.C. §§ 401, 403, 408 or 409).

STATEMENT OF THE CASE

The facts are uncontested. On January 18, 1995 the debtor filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, District of New Jersey. Petitioner, Thomas J. Orr, was subsequently appointed as Chapter 7 Trustee. At the time of filing the debtor was the account holder of a certain Individual Retirement Account holding approximately $143,000.

The debtor scheduled this property as not being an asset of the estate, claiming N.J.S.A. 25:2-1 as his grounds therefore. Debtor elected the federal exemptions. Debtor then filed a motion seeking to have the I.R.A. declared not property of the estate. The Trustee filed a cross motion seeking inclusion of the asset. The debtor's motion was granted and the Trustee's denied by the Bankruptcy Court on September 29, 1995, the court relying upon *Patterson v. Shumate, infra.*, ruling that said case functions to exclude any trust asset subject to any restrictions on transfer. The Trustee appealed to the District Court which affirmed on the same grounds via an Opinion dated February 26, 1996. The Trustee appealed to the United States Court of Appeals which, on January 22, 1997, also affirmed on the same grounds. The Trustee now seeks a Writ of Certiorari with regards to that holding.

REASONS FOR GRANTING THE WRIT

In 1992 the Supreme Court issued an opinion in *Patterson v. Shumate, infra,* which substantially altered the manner in which individual bankruptcy cases are administered. As a result statutes were enacted, changes were made in debtor strategies and an abundance of litigations ensued seeking to exploit or clarify the questions left unanswered by that influential opinion. The instant case is one such litigation.

The primary question left unanswered by *Patterson* revolves around the interpretation of a single sentence in that ruling which provides that 11 U.S.C. § 541(c) serves to entitle "a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant non-bankruptcy law" *Patterson v. Shumate*, 504 U.S. 753, at 758 (1992). That sentence was used by the court to set forth the core of the *Patterson* ruling, that "*any* applicable nonbankruptcy law" was *any* law, state or federal. Unfortunately,

neither that sentence nor the balance of the opinion explore in any detail the role the nature of the *restriction* should play in a section 541(c) analysis. Does the restriction merely continue into the bankruptcy, with its effect on the accessibility of an asset determined by the nature and extent of the restriction, as the language of the code suggests? Or does the mere existence of a restriction, no matter how slight or trivial, serve to exclude the asset in its entirety as the referenced sentence of *Patterson* would seem to suggest? This unanswered question in *Patterson* has left Trustees and debtors wondering and has kept court dockets across the country filled with litigation and conflicting opinions.

In the district of the instant case alone the bankruptcy courts have issued three conflicting opinions, two finding the nature of the restriction relevant and the third finding a restriction to be an automatic trigger for exclusion. *See In Re Van Nostrand*, 183 B.R. 82 (Bkrtcy. D. N.J. 1995); *In Re Lamb*, 179 B.R. 419 (Bkrtcy. D. N.J. 1994); *In Re Yuhas*, 186 B.R. 381 (Bkrtcy. D. N.J. 1995). It would appear that other jurisdictions are similarly occupied with conflicts over *Patterson* and the nuances of section 541(c). *See In Re Conner*, 73 F.3d 258 (9th Cir. 1996) (concerning apparent implication of *Patterson* on meaning of debtor's control over fund assets); *Whetzal v. Alderson*, 32 F.3d 1302 (8th Cir. 1994) (debtor's ability to elect lump sum payment); *In Re Meehan*, 102 F.3d 1209 (11th Cir. 1997) (implied meaning of *Patterson* as to effect of debtor's control over asset); *In Re Solomon*, 67 F.3d 1128 (4th Cir. 1995) (I.R.A. income in Chapter 13); *Drewes v. Schonteich*, 31 F.3d 674, at 678 (8th Cir. 1994) (Trustee seeking percentage of spendthrift trust exempt from state law protection); *In Re Houck*, 181 B.R. 187 (Bkrtcy. E.D. Pa. 1995) (debtor's ability to liquidate I.R.A. precludes exclusion); *In Re Brewer*, 154 B.R. 209 (Bkrtcy. W.D. Pa. 1993) (tax penalties not restriction on I.R.A.); *In Re Bresnahan*, 183 B.R. 506 (Bkrtcy. S.D. Ohio 1995) (plan

distributions); *In Re Watson*, 192 B.R. 238 (Bkrtcy. D. Nev. 1996) (Non-ERISA qualified plan); *Matter of Fink*, 153 B.R. 883 (Bkrtcy. D. Neb. 1993) (annuity contract); *In Re Delnero*, 191 B.R. 539 (Bkrtcy. N.D. N.Y. 1992) (plan distributions); *In Re McClellan*, 152 B.R. 252 (Bkrtcy. C.D. Ill. 1993), *aff'd*, 162 B.R. 525, *rev'd*, 45 F.3d 432 (restriction must be in trust); *In Re Denton*, 169 B.R. 608 (Bkrtcy. W.D. Tex. 1994) (partial restrictions on debtor's access do not exclude asset); *In Re Silviera*, 186 B.R. 168 (Bkrtcy. D. Mass. 1995) (nature of restriction not relevant); *In Re Harless*, 187 B.R. 719 (Bkrtcy. N.D. Ala. 1994) (absence of clause in trust precludes exclusion, tax penalty not a restriction to I.R.A.); *In Re Slepian*, 170 B.R. 712 (Bkrtcy. S.D. Ala. 1994) (absence of clause in trust precludes exclusion, tax penalty not a restriction to I.R.A.); *In Re Craig*, 204 B.R. 756 (D. N.D. 1997) (nature of restriction not relevant). Clearly *Patterson* would seem to have raised as nearly as many questions as it answered.

In the instant case, the debtor contends that his Individual Retirement Account, subject to a restriction on transfer which exempts the asset from the claims of his creditors, is excluded from his bankruptcy estate due to the existence of the restriction. The Trustee argues that the precise language of 11 U.S.C. § 541(c) does not so provide, but rather acts to continue the restriction into the bankruptcy. As the nature of the restriction still allows the Trustee access to the asset, the asset is therefore property of the estate. The Court of Appeals, however, felt compelled by it's interpretation of the language of *Patterson* to rule that as debtor's I.R.A. was a trust subject to restrictions the trust is therefore excluded in its entirety without regard to the nature of the restriction *In Re Yuhas*, *supra*, at 614. The Petitioner submits that said holding is in direct conflict with the plain meaning of the language of the statutes, public policy and tenets core to the bankruptcy common law as set forth more fully below.

To resolve such conflicts and the unanswered questions of the *Patterson* decision, the Supreme Court must revisit and expand its interpretation of 11 U.S.C. § 541(c). The instant case provides that opportunity. Accordingly, Petitioner prays the Court to grant the Writ for the reasons set forth herein.

I.

PROPER STATUTORY INTERPRETATION OF 11 U.S.C. § 541(c) MANDATES A HOLDING THAT A TRUST SUBJECT TO AN ENFORCEABLE RESTRICTION ON TRANSFER IS PROPERTY OF THE ESTATE SUBJECT TO THE TERMS OF THAT RESTRICTION.

In its ruling below, the Court of Appeals held that the existence of an enforceable restriction on transfer of the debtor's I.R.A. mandated that said I.R.A. be excluded from the property of the estate without reference to the nature or extent of the restriction *In Re Yuhas*, *supra*, at 614. In reaching that conclusion the court stated that the analysis was premised upon the interplay of subsections 541(c)(1) and 541(c)(2) as follows;

> There are two arguable interpretations of this interplay. One is that trusts subject to the type of restriction described in Section 541(c)(2) are entirely excluded from a bankruptcy estate. The other is that such trusts are included but that they remain subject to the same restrictions that applied before bankruptcy.

In Re Yuhas, 104 F.3d 612, at 614 (3rd Cir. 1997). Although the Court of Appeals was correct in identifying the possible interpretations, its decision to exclude any trust subject to an enforceable transfer was the wrong choice. That choice was

compelled by the Supreme Court's holding that section 541(c)(2) "entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any applicable nonbankruptcy law." *In Re Yuhas, supra.*, at 614; *citing, Patterson v. Shumate, supra* at 758. However, the *Patterson* ruling dealt with the definition of "applicable nonbankruptcy law" and not the effects of differing types of restrictions. As such the implied ruling in the quoted sentence that *any* enforceable restriction on transfer compels that the subject asset be excluded without reference to the nature of the restriction is unintentional dicta. Accordingly the Court of Appeals' reliance on that implied ruling is flawed, leading that court to make an improper interpretation of section 541(c) and to make a flawed ruling in the instant case below.

A more proper interpretation of 11 U.S.C. § 541(c) may be had by an examination of the plain meaning of the language of that statute. Section 541(c)(1) provides in pertinent part:

> (c)(1) Except as provided in paragraph (2) . . . an interest . . . becomes property of the estate . . . notwithstanding any provision . . . —
>
> (A) that restricts . . . transfer of such interest by the debtor; or
>
> (B) that is conditioned on (insolvency, financial condition or bankruptcy) . . . and that effects . . . a . . . modification, or termination of the debtor's interest in property.

Clearly the plain meaning of this statute is that any restriction on transfer not excepted by paragraph (2) is

inapplicable to property of the estate. The purpose of the statute would be to expunge any such restriction upon an asset of the debtor as it becomes property of the estate. The only restrictions not so expunged would be those provided for in paragraph (2), which states as follows:

> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2). Again the plain meaning of the statute is inescapable. Any restriction upon transfer of a trust is enforceable *in* the bankruptcy. No portion of the language of the statute purports to exclude property from the estate. Thus the court's ruling that this section acts to exclude trusts subject to its provisions is not supported by the language of the statute. Indeed the statute specifically functions to give continued applicability to the restriction *within* the bankruptcy, leading to the conclusion that the underlying asset must also be presupposed to be included within the bankruptcy. Thus the plain meaning of section 541(c)(2) does not of itself exclude property from a bankruptcy estate.

A similar result ensues from examining the interplay between the language of subsections 541(c)(1) and 541(c)(2). Paragraph (1) provides that "Except as provided in paragraph (2) . . . an interest . . . becomes property of the estate . . . notwithstanding any . . . agreement. . . . or . . . law . . . that . . . restricts . . . transfer of such interest by the debtor". Paragraph (2) provides that a "restriction . . . on . . . a trust . . . is enforceable (in bankruptcy)."

Clearly the exception provided by paragraph (2) does not

modify "becomes property of the estate". Such an interpretation is illogical as paragraph (2) does not refer to the inclusion or exclusion of property from an estate. However paragraph (2) does clearly and logically modify "notwithstanding any agreement or law that restricts transfer of an interest" as paragraph (2) serves to continue a restriction on transfer while "notwithstanding . . ." serves to terminate a restriction on transfer. Accordingly the plain meaning of section 541(c) is to terminate all restrictions on transfer as to property of the estate, but for restrictions on trusts. Trusts become property of the estate subject to any enforceable restrictions.

Accordingly the plain language of 11 U.S.C. § 541(c) compels a holding that the restriction on transfer of a debtor's I.R.A. does not exclude that trust from his estate. Rather the I.R.A. is property of his estate subject to that restriction. The Court of Appeals' ruling to the contrary was a mistake of law. As set forth below once within the bankruptcy, an examination of the restriction upon the I.R.A. must result in a finding that the asset may be liquidated by the Trustee. Therefore the opinion below excluding the asset from the estate set forth an erroneous rule of law and misleading precedent for the Third Circuit. Accordingly the Petitioner requests that the Court grant the Petition and issue a Writ of Certiorari.

II.

RESPONDENT'S RIGHT TO VOLUNTARILY LIQUIDATE HIS I.R.A. IS NOT RESTRICTED BY N.J.S.A. 25:2-1 AND IS THEREFORE PROPERTY OF THE ESTATE ACCESSIBLE BY THE TRUSTEE.

The question as to whether or not an individual retirement account is excluded from an estate in bankruptcy in the District of New Jersey hinges upon N.J.S.A. 25:2-1(b) and its interaction

with 11 U.S.C. § 541(c)(2). The state statute states in relevant part that certain trusts, Individual Retirement Accounts among them, "shall be exempt from all claims of creditors. . . ." N.J.S.A. 25:2-1. The federal code section in question provides that trusts for the debtor are property of the bankruptcy estate but that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title" 11 U.S.C. § 541(c).

As set forth above, a clear plain reading of 11 U.S.C. § 541(c)(2) does not preclude an asset subject to restrictions on transfer from being property of a debtor's estate. Rather, the statute clearly states that a restriction on transfer is merely "enforceable" in bankruptcy. Thus, the asset becomes property of the estate subject to those continuing restrictions whatever they may be. Therefore, the question of whether or not an asset is accessible by a Trustee will be dependent not merely upon whether or not there are restrictions but rather upon an examination of the restrictions involved in each case.

In some cases, such as *Patterson*, the restrictions may be so broad as to preclude any party, including the debtor, from reaching the asset. In those instances the asset is indeed excluded from the bankruptcy as a practical matter since there is in fact no immediate interest in the asset, only a non-transferable future expectation. However, where a restriction is less broad, it would be improper to exclude the entirety of the asset from the estate. Rather, under section 541, the asset is property of the estate and such non-restricted interests therein as remain are available for administration by the Trustee.

In the instant case, N.J.S.A. 25:2-1 safeguards the I.R.A. account from the claims of creditors. This, arguably, is a restriction on one form of transfer of the asset. However, the state statute in no way impairs the debtor's right to access the

funds in the account. At any time the debtor may liquidate the account for his benefit. This ability to liquidate the account is not restricted by N.J.S.A. 25:2-1. Accordingly, the debtor's right to liquidate the account is not restricted by state law and therefore is not restricted within the bankruptcy by virtue of section 541(c)(2). *See In Re Houck*, 181 B.R. 187 (Bkrtcy. E.D. Pa. 1995). This interest in the account, therefore, becomes property of the estate pursuant to the remainder of 11 U.S.C. § 541. *In Re Cathcart*, 203 B.R. 599 (Bkrtcy. E.D. Va. 1997).

It is without question that a Chapter 7 Trustee stands in the shoes of the debtor, not creditors, and that he is thereby empowered to pursue the property and causes of action belonging to the debtor. *In Re Dow*, 132 B.R. 853 (Bkrtcy. S.D. Ohio 1991). All assets, interests and rights of the debtor at the time of the filing become property of the estate to be administered by the Trustee. 11 U.S.C. § 541; 11 U.S.C. § 704 *In Re Cathcart*, 203 B.R. 599 (Bkrtcy. E.D. Va. 1997). Thus, the restrictions against creditors imposed by N.J.S.A. 25:2-1 do not restrict the actions of the Trustee, who acts in the place of the debtor. As there are no restrictions upon the debtor with regard to the I.R.A., there are no restrictions upon the Trustee. Thus the debtor's interest in the I.R.A. is an asset of the estate which is accessible by the Trustee.

As the restrictions imposed by applicable nonbankruptcy law are not sufficiently broad to prevent the Trustee from reaching and administering debtor's I.R.A., the ruling of the Court of Appeals to the contrary was a mistake of law, set forth an erroneous rule of law and is a misleading precedent in the Third Circuit. Accordingly the Petitioner requests that the Court grant the Petition and issue a Writ of Certiorari.

III.

SOUND BANKRUPTCY POLICY REQUIRES A HOLDING THAT A SELF-SETTLED REVOCABLE TRUST NOT BE EXCLUDED FROM A DEBTOR'S BANKRUPTCY ESTATE UNDER 11 U.S.C. § 541(c)(2).

As set forth above, any asset of the debtor which the debtor has the right to liquidate will always be included in a bankruptcy administration as the Trustee stands in the shoes of the debtor. Such a ruling is not only sound interpretation of the Code and the tenets of bankruptcy common law but is also mandated by the policy considerations inherent in our bankruptcy system. Yet these policy constraints were disregarded below. Section 541(c)(2) of the Bankruptcy Code states in relevant part that a "restriction on transfer of a beneficial interest of the debtor in a trust" under non-bankruptcy law is applicable to the debtor's bankruptcy estate. The court below interpreted this clause to exclude an asset from a bankruptcy estate if there was a statute imposed impairment on a creditor's ability alone to reach the asset in a non-bankruptcy setting. The court held this to be true even if there is no contemporaneous restraint on the debtor's ability to liquidate the asset for his own benefit. It is the Trustee's position that the lower court's holding is a grave violation of the public policies concerning bankruptcy estates and the balancing of the conflicting interests of a fresh start for the debtor and the protection of the rights of creditors.

There is a strong public policy that will prevent any person from placing his property in what amounts to a revocable trust to his own benefit which would be free from the claims of his creditors. *Aronsohn & Springstead v. Weissman*, 230 N.J. Super. 63, 552 A.2d 649 (N.J. Super. Ct. App. Div.), *cert. denied*, 117 N.J. 36, 563 A.2d 808 (1989). The purpose of this strong public policy is obvious, to prevent the legalization of what would

otherwise be the fraudulent activity of converting and hiding assets to avoid the collection actions of creditors. Should the lower court's ruling stand, it would be sounder fiscal practice for those in distress to invest in I.R.A.s rather than repaying or settling difficult debts. Because of this fact, persons with moderate assets who would otherwise reorganize their debts and repay their creditors could profitably ignore them and file bankruptcy, indeed less scrupulous wealthier debtors could plan ahead and amass large sums in anticipation of bankruptcy. This could be done in incremental amounts which would not attract the attention of overworked Trustees or creditors with little to gain from engaging in the costly business of the bringing of objections to discharge. Such events would lead to increased losses to business and consumer creditors. Such a trend could only increase the costs of financing and further remove that option from the means of lower income consumers. Thus, strong public policy precludes a holding that N.J.S.A. 25:2-1 excludes an I.R.A. or other revocable trust from a bankruptcy estate via section 541 of the Code.

Furthermore, the aforementioned public policy concerns are not preempted by any other compelling public interests in the exclusion of such assets from a bankruptcy estate. The Bankruptcy Court noted and the District Court and Court of Appeals concurred without comment, that debtors already have the ability to place assets in a revocable trust and thereby place them beyond the reach of creditors. The court reasoned, therefore, that removing that ability in a bankruptcy proceeding would create two different results between the state law and bankruptcy law. The conclusion that this is improper, however, overlooks the different status of a debtor remaining indebted to his creditors outside of a bankruptcy and one seeking a discharge of those debts in a bankruptcy proceeding.

While it is true that under N.J.S.A. 25:2-1 a citizen may

place assets into a revocable trust to the detriment of his creditors, it is not true that he does so to the ultimate denial of his obligations. At some point the person in question will wish to reach those assets for his own benefit. At that time the funds will be removed from the trust and subject to the still existing claims of creditors. Thus while a New Jersey resident may frustrate his creditors under state law, he can not completely deny them satisfaction lest he deny himself the funds in question. N.J.S.A. 25:2-1 does not discharge debts but merely protects long term retirement investments if indeed they are very long term.

Conversely, should the lower court ruling stand, a debtor may accumulate and place the same funds in a revocable trust and then file a bankruptcy proceeding. Thereafter he is discharged from his debts to his creditors. He may then simply withdraw the funds in the trust and enjoy the benefit thereof immediately to the complete detriment of his creditors and public policy. Under the lower court's ruling N.J.S.A. 25:2-1 becomes not a protector of long term retirement investments but a means of legally defrauding creditors.

Alternatively, construing section 541 to preclude an exclusion of an I.R.A. from an estate leads to results which are more consistent and satisfactory to public policy. If a debtor wishes he may stay out of bankruptcy and retain his Individual Retirement Account for his eventual retirement. If the funds retained are reasonable in amount, his creditors will not force him into bankruptcy because to do so would not be profitable to any one creditor. If in fact the amounts held in the trust are of fraudulent levels then his creditors would force him into bankruptcy which would provide for a fair distribution to the debtor and the creditors. Should the debtor have in fact only such funds in the account as are necessary for his support upon retirement, then the entire amount would be exempt under 11

U.S.C. § 522(d)(10)(E). Alternatively, if the debtor is one who in fact has few assets and who is therefore most likely not to be acting fraudulently, the debtor could elect the state exemptions and thereby exempt the I.R.A. in its entirety. Such a result would also serve to inhibit creditors from incurring the costs of an involuntary bankruptcy without evidence of fraud or other assets. In all cases a just and equitable "common sense" result ensues and public policy is best served.

Thus, rather than supporting the lower court's conclusions, an analysis of disparate results indicates that allowing the state statute to exclude an I.R.A. from an estate in bankruptcy leads to a much more disparate and undesirable result than would otherwise be the case.

To enable the more reasonable outcome to occur, it is necessary to properly define and interpret the statutes in question and their purpose. As the question is one of sound bankruptcy policy it is clear that the statute to be examined must be 11 U.S.C. § 541 as it is the one which purports to exclude certain assets from the estate. That said statute reads in relevant part that a "restriction on transfer of a beneficial interest of the debtor in a trust" extends to the debtor's bankruptcy. It is the position of the Trustee that this clause was intended solely for the exclusion from a bankrupt's estate of trusts created by another for the long term benefit of the debtor and from which the debtor has no right of immediate liquidation, such as pension plans. Such a reading would serve the public interest in protecting bona fide retirement funds without the risks to public policy posed by including revocable self-settled trusts.

In essence, the Trustee submits that section 541(c)(2) was intended to be read and should be read as though "restriction on transfer" were to read "restriction on the debtor's ability to transfer." Only by such a reading are the policy interests inherent

throughout the Bankruptcy Code best served. Furthermore, such a reading is compelled by the status of the Trustee as one who "stands in the shoes of the debtor" as noted above.

As there is no restriction on a debtor's ability to transfer an I.R.A. created by N.J.S.A. 25:2-1, under the above interpretation of the Bankruptcy Code and the common law, no restriction is placed on the inclusion of the asset within the estate. Accordingly, the debtor's Individual Retirement Account should be included in his bankruptcy estate and the Court of Appeals ruling to the contrary was a mistake of law, a statement of an erroneous rule of law and stands as a misleading precedent for the Third Circuit. Accordingly the petitioner requests that the Court grant the Petition and issue a Writ of Certiorari.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 22, 1997

Filed January 22, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5146

IN RE: RONALD J. YUHAS,

Debtor

THOMAS J. ORR,

Appellant

v.

RONALD J. YUHAS

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 95-5551)

Argued: October 1, 1996
Before ALITO and McKEE, *Circuit Judges*
and GREEN, *District Judge**

---

* The Honorable Clifford Scott Green, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

(Opinion Filed: January 22, 1997)

Thomas J. Orr, Esq.
John K. Justin, Esq. (Argued)
331 High Street, Second Floor
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Counsel for Appellant

Broege, Neuman, Flecher & Shaver
Peter J. Broege, Esq. (Argued)
25 Abe Voorhees Drive
Manasquan, New Jersey 08736

Counsel for Appellee

OPINION OF THE COURT

ALITO, *Circuit Judge*

The issue in this appeal is whether a New Jersey statute, N.J.S.A. § 25:2-1(b), that protects a qualified individual retirement account (IRA) from claims of creditors constitutes a "restriction on the transfer of a beneficial interest of the debtor in a trust" within the meaning of 11 U.S.C. § 541(c)(2) and thus results in the exclusion of the IRA from a bankruptcy estate. We hold that it does, and we therefore affirm the decision of the district court.

I.

Debtor Ronald J. Yuhas (the "debtor") filed a Chapter 7 bankruptcy petition, and a trustee was appointed. At the time

of his petition, the debtor had an IRA account containing approximately $143,000. He states that these funds represented his interest in a terminated pension plan that he had "rolled over" into his IRA two years earlier.

The debtor listed the IRA as an asset but claimed that it was not part of the bankruptcy estate because of N.J.S. § 25:2-1(b). He then filed a motion seeking a declaration to this effect, and the trustee filed a cross-motion seeking to have the IRA declared an asset of the estate. The bankruptcy court granted the debtor's motion and denied the trustee's motion, and the district court affirmed. The trustee then took this appeal.

II.

Section 541(c)(1) of the Bankruptcy Code, 11 U.S.C. § 541(c)(1), broadly states that a bankruptcy estate includes "all legal or equitable interests of the debtor in property" as of the commencement of the bankruptcy estate "[e]xcept as provided in subsections (b) and (c)(2) of this section." Subsection (c)(2) provides:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2). The question before us is whether N.J.S.A. § 25:2-1(b) constitutes a "restriction on the transfer of a beneficial interest of the debtor in a trust under applicable nonbankruptcy law."

Appendix A

N.J.S.A. § 25:2-1(b) provides in pertinent part:

> Notwithstanding the provisions of any other law to the contrary, any property held in a qualifying trust and any distributions from a qualifying trust, regardless of the distributions plan elected for the qualifying trust, shall be exempt from all claims of creditors and shall be excluded from the estate in bankruptcy . . . .
>
> . . .
>
> For purposes of this section, a "qualifying trust" means a trust created or qualified and maintained pursuant to federal law, including, but not limited to, section . . . 408 . . . of the federal Internal Revenue Code of 1986 (26 U.S.C. § . . . 408 . . .).

Section 408(a) of the Internal Revenue Code, 26 U.S.C. § 408(a), defines an "individual retirement account" as "a trust" that is "created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" and that meets certain requirements. IRAs that meet these requirements are said to be "qualified" and receive favorable federal income tax treatment. *See* Section 408(d) and (e) of the Internal Revenue Code. 26 U.S.C. § 408(d) and (e).

The trustee's first argument is that under § 541(c)(1) and (2) trusts subject to transfer restrictions are not excluded in their entirety from a bankruptcy estate but rather are included in the estate subject to those restrictions. Therefore, he argues, the

debtor's IRA should be included in the bankruptcy estate with the state-law protection against creditors' claims remaining in effect. And since he stands in the shoes of the debtor, the trustee maintains this restriction on creditors does not impair his ability to liquidate the IRA.

This argument, however, is inconsistent with the Supreme Court's analysis in *Patterson v. Shumate,* 504 U.S. 753, 758 (1992), of the interplay between § 541(c)(1) and § 541(c)(2). There are two arguable interpretations of this interplay. One is that trusts subject to the type of restriction described in § 541(c)(2) are entirely excluded from a bankruptcy estate. The other is that such trusts are included but that they remain subject to the same restrictions that applied before bankruptcy. In *Patterson,* the Court clearly chose the first interpretation, stating that "[t]he natural reading of [§ 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any applicable nonbankruptcy law." *Patterson,* 504 U.S. at 758.

Although the trustee in essence urges us to disregard this statement as careless dictum, we will not do so. The statement in *Patterson* concerned an important step in the Court's reasoning and represented an entirely natural reading of the statutory language. The trustee contends that the Court used this language because the case before it involved a debtor's interest in a trust, an ERISA plan, that was entirely beyond the reach of either the debtor or his creditors. Thus, the trustee maintains that what the Court meant to say was that § 541(c)(2) excludes from property of the estate any interest in a plan or trust that contains a restriction that "renders the entirety of the asset unreachable" under applicable nonbankruptcy law. Appellant's Br. at 6. In our judgment, this is not a plausible interpretation of what the

Court said, and we must therefore reject it. Accordingly, if the debtor's IRA meets all of the requirement of § 541(c)(2), we must hold that it completely excluded from the bankruptcy estate.

These requirements are the following: (1) the IRA must constitute a "trust" within the meaning of 11 U.S.C. § 541(c)(2); (2) the funds in the IRA must represent the debtor's "beneficial interest" in that trust; (3) the IRA must be qualified under Section 408 of the Internal Revenue Code: (4) the provision of N.S.J.A. § 25:2-1 stating that property held in a qualifying IRA is "exempt from all claims of creditors" must be a "restriction on the transfer" of the IRA funds; and (5) this restriction must be "enforceable under nonbankruptcy law." In this appeal, the trustee's arguments do not focus on any of the first three requirements, and thus we assume for present purposes that they are satisfied. Nor does the trustee dispute the fact that N.J.S.A. § 25:2-1 would constitute "applicable nonbankruptcy law" if it restricted transfer of the debtor's interest in the way that the trustee believes is required by 11 U.S.C. § 541(c)(2).[1] Thus, to the extent that the trustee's remaining arguments confront the statutory language, they focus on the fourth requirement, *i.e.*, the requirement that N.J.S.A § 25:2-1 must constitute a "restriction on the transfer" of the IRA funds.

The Bankruptcy Code defines the term "transfer" to encompass a wide range of dispositions:

> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with

---

1. Applicable nonbankruptcy law includes both federal law such as ERISA, *see Patterson v. Shumate*, 504 U.S. 753, 758 (1992), and state law, *Velis v. Kardanis*, 949 F.2d 78, 80-81 (3d Cir. 1991).

> property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

11 U.S.C. § 101(54). Any procedure by which funds in an IRA might be reached to satisfy the "claims of creditors" (N.J.S.A. § 25:2-1(b)) would seem to fall within this broad definition and thus constitute a "transfer." Consequently, N.J.S.A. § 25:2-1(b) would seem to be a "restriction on . . . transfer."

Despite this statutory language, the trustee contends that "Section 541(c)(2) was intended to be read and should be read as though 'restriction on transfer' were to be read 'restriction on the debtor's ability to transfer.' Only by such a reading are the policy interests inherent throughout the Bankruptcy Code best served. Appellants Br. at 13. The trustee maintains that this reading is needed to prevent "the legalization of what would otherwise be the fraudulent activity of converting and hiding assets to avoid the collection actions of creditors" and that "it would be lunacy for any debtor's rights attorney . . . to advise his clients to do anything but place their liquid assets into an IRA account." Appellants Br. at 9-10. He thus submits that § 541(c)(2) was intended solely to exclude trusts, such as pension plans and spendthrift trusts, that are created by another for the long-term benefit of the debtor and with respect to which the debtor has no right of immediate liquidation. Appellant's Br. at 13.

In response to this argument, the debtor points out that the Bankruptcy Code already contains protection against fraudulent transfers of assets. *See e.g.,* 11 U.S.C. § 544(b) (trustee may

avoid any transfers of interest of property by a debtor that is voidable under applicable law, such as state fraudulent conveyances law); *id.* § 547(b)(4)(a) (allowing a trustee to avoid certain transfers of interest by a debtor made on or within 90 days prior to the date of filing the petition for bankruptcy protection); *id* § 548 (allowing a trustee to avoid any transfer of property made by a debtor within one year of filing a petition for bankruptcy protection if, among other things, the transfer was made with actual intent to defraud or was made in exchange for less than reasonably equivalent value while the debtor was insolvent). Further militating against the trustee's argument is the generally applicable restriction in the Internal Revenue Code on the amount that an individual can transfer into an IRA in any one year. *See* 26 U.S.C. § 408(a)(1) ("[N]o contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year in excess of $2,000 on behalf of any individual. In addition, the bankruptcy judge argued that excluding an IRA from a bankruptcy estate furthered the policy of protecting retirement savings, and she noted our statement in *Velis v. Kardanis,* 949 F.2d 78, 82 (3d Cir. 1991):

> [T]here can be no doubt that Congress has expressed a deep and continuing interest in the preservation of pension plans, and in encouraging retirement savings, as reflected in the statutes which have given us ERISA. Keogh plans and IRAs. We believe it reasonable to conclude that Congress intended to provide protection against the claims of creditors for a person's interest in pension plans, unless vulnerable to challenge as fraudulent conveyances or voidable preferences.

It is not for us to take sides in this policy debate. "Given the clarity of the statutory text . . ., [the trustee] bears an 'exceptionally heavy' burden of persuading us that Congress intended to limit the § 541(c)(2) exclusion to restrictions on transfer" that apply only to the debtor, *Patterson*, 504 U.S. at 760, and the trustee's arguments are insufficient under this standard.

Our rejection of this argument dooms the trustee's final argument, *i.e.*, that § 541(c)(2) is merely a state exemption statute available for debtors who elect state exemptions pursuant to 11 U.S.C. § 522(b)(2).[2] This argument is based on *In re Van Nostrand*, 183 B.R. 82, 86 (Bankr. D.N.J. 1995), but the analysis of § 541(c)(2) in that decision is flawed.

In *Van Nostrand*, the court had that N.J.S.A. § 25:2-1(b) did not constitute a "restriction on . . . transfer" for two reasons. 183 B.R at 84. First, the court interpreted *Patterson* to mean that such a restriction must be included in the document that creates the trust rather than a statute. The trustee "concedes that this interpretation of *Patterson* may be incorrect," Appellant's Br. at 18, and we agree that it is wrong.[3] Second, *Van Nostrand*

---

2. 11 U.S.C. § 522 allows a debtor to choose between federal exemptions listed in subsection (d), or any exemptions allowed under state, local and federal nonbankruptcy law. 11 U.S.C. § 522(b)(2)(A). A debtor must choose one or the other, but may not select exemptions from both. *Id*

3. Ironically, this argument is based on the same sentence in *Patterson* that we found to doom the trustee's prior argument. As noted, the *Patterson* Court wrote: "The natural reading of [§ 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or *trust that contains* a transfer restriction enforceable under any relevant nonbankruptcy law." 504 U.S. at 758 (emphasis added). *Van Nostrand* and some other cases have (Cont'd)

had that a "restriction . . . on transfer" must preclude transfer by the debtor, not by creditors. 183 B.R. at 85.[4] We have already explained why we cannot agree with this argument. The *Van Nostrand* court then went on to consider a contention not made by the debtor in this case, *viz.*, that "N.J.S.A. 25:2-1(b) is a state exclusion statute which must be enforced by the bankruptcy court so that the debtor receives treatment in the bankruptcy court similar to treatment which he would receive in state court. *Butner v. U.S.*, 440 U.S. 48 (1978)." 183 B.R. at 85. The court disagreed, holding that N.J.S.A. § 25:2-1(b) was instead a state exemption statute. 183 B.R. at 85, and it is upon this last holding that the trustee now relies.

This holding is not relevant, however, for present purposes. The debtor here does not argue that N.J.S.A. § 25:2-1(b) is a "state exclusion statute," and insofar as the Van *Nostrand* court addressed the argument that the debtor in this case has made,

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(Cont'd)
interpreted this language to mean that a trust subject to a statutory restriction on transfer cannot come within § 541(c)(2). We disagree. In *Patterson*, the Court said that a debtor may exclude a trust from the bankruptcy estate if the trust contains an appropriate restriction; the court did not say that a debtor may exclude a trust *only* if it, as opposed to a statute, contains such a restriction. Moreover, the statutory language that the court was interpreting does not hint at the sort of restriction that *Van Nostrand* and similar cases impute to *Patterson*, and we feel confident that the court would not have construed the statute as containing such a restriction without providing an explanation. Therefore, we reject the argument that a restriction contained in a statute cannot qualify as a "restriction on . . . transfer under applicable nonbankruptcy law" within the meaning of § 541(c)(2).

4. *In re Lamb*, 179 B.R. 419 (Bankr. D.NJ. 1994), on which the trustee also relies, is based on this same incorrect conclusion. *See* 179 B.R at 423.

i.e., that N.J.S.A. is a "restriction on . . . transfer," that court erred.

III.

In conclusion, we have considered all the arguments raised by the trustee but are not persuaded. We therefore affirm the decision of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 22, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5146

IN RE: RONALD J. YUHAS, Debtor

THOMAS J. ORR,

Appellant

v.

RONALD J. YUHAS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(Civil Action No. 95-5551)

Before: ALITO and McKEE, *Circuit Judges*
and GREEN, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel October 1, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Appendix B

Court entered March 1, 1996, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ P. Douglas Sisk
Clerk

Dated: January 22, 1997

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 26, 1997

* * *

ORDER

The opinion in this case is hereby amended:

The following is added as footnote 5 at the end of the last sentence of Part II.

> Our decision in this case is fully consistent with *In re Clark*, 711 F.2d 21 (3d Cir. 1983). Our decision here concerns the question whether a qualified IRA is excluded from a bankruptcy estate under 11 U.S.C. § 541, as a result of a 1993 amendment of N.J.S.A. § 25:2-1(b). By contrast, the holding in *In re Clark, supra,* concerned the meaning of an exemption provision, 11 U.S.C. § 522(d)(10)(E). It is true that the parties in *In re Clark* appear to have assumed that the petitioner's Keogh plan was property of the bankruptcy estate, *see* 711 F.2d at 22, but at that time the amendment of N.J.S.A. § 25:2-1(b) that provides the foundation for our decision here had not been enacted, and thus there was no basis for contending that the Keogh plan was excluded from the estate on the ground that we endorse here.

BY THE COURT:

/s/ Samuel A. Alito, Jr.
Circuit Judge

Appendix C

DATED: February 26, 1997

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY FILED FEBRUARY 27, 1996

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 95-5551 (AET)

IN RE RONALD YUHAS,

Debtor.

THOMAS ORR,

Trustee/Appellant,

v.

RONALD YUHAS,

Debtor/Appellee.

OPINION

THOMPSON, Chief Judge

This matter is before the Court on appeal by the trustee in bankruptcy, Thomas Orr, from a ruling of the bankruptcy court, excluding funds in the debtor's Individual Retirement Account from the bankruptcy estate. For the reasons set forth in this Opinion, the ruling of the bankruptcy court is affirmed.

Appendix D

I. BACKGROUND

Reduced to basics, this appeal requires the Court to decide whether N.J.S.A. 25:2-l(b) and 11 U.S.C. § 541(c)(2) permit exclusion of an Individual Retirement Account ("IRA") from the bankruptcy estate.

On January 18, 1995 appellee Ronald Yuhas filed for bankruptcy under Chapter 7 of the bankruptcy code. Appellant Thomas Orr was subsequently appointed as the Chapter 7 trustee in bankruptcy. At the time of his bankruptcy filing, the debtor was the account holder for an Individual Retirement Account ("IRA") containing approximately $143,000. Mr. Yuhas listed the IRA as an asset on his chapter 7 petition, however, he noted in the schedules that under N.J.S.A. 25:2-l(b) the IRA did not become part of the bankruptcy estate.

In June of 1995 the debtor moved to have the bankruptcy court declare the IRA not property of the estate. The trustee cross-moved to have the IRA declared property of the estate. After hearing oral argument on the motions, the bankruptcy court determined that the IRA was excluded from the estate because N.J.S.A. 25:2-l(b) created a restriction on transfer sufficient to exclude the IRA from the estate pursuant to 11 U.S.C. § 541(c)(2). The court entered an order consistent with this decision on September 29, 1995. The trustee now appeals from the September 29th order of the bankruptcy court.

II. DISCUSSION

On appeal, this Court may set aside the bankruptcy court's factual findings only if the findings are clearly erroneous. The bankruptcy court's legal conclusions, however, are subject to

the district court's plenary review. *In re Modular Structures, Inc.*, 27 F.3d 72, 76 (3d Cir. 1994) (citing *J.P. Fyfe, Inc. of Florida v. Bradco Supply Corp.*, 891 F.2d 66, 69 (3d Cir. 1989)). When reviewing a decision which falls within the bankruptcy court's discretionary authority, the district court may only determine whether or not the lower court abused its discretion. *See, e.g., In re Vertientes, Ltd.*, 845 F.2d 57, 59 (3d Cir. 1988) (leave to file late proof of claim); *In re Rosinski*, 759 F.2d 539, 540 (6th Cir. 1985) (whether to reopen a bankruptcy case); *Matter of Chung King, Inc.*, 753 F.2d 547, 549 (7th Cir. 1985) (whether to confirm a sale); *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985) (whether to lift automatic stay). This appeal challenges the bankruptcy court's legal conclusions, thus this Court's review is plenary.

Pursuant to the bankruptcy code, the debtor's estate is comprised of "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). Clearly, this broad definition encompasses the debtor's IRA. The bankruptcy code, however, also sets forth limited exclusions from the estate. Relevant to the present controversy is 11 U.S.C. § 541(c), which provides:

> (c)(l) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate . . .
>
> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

Appendix D

In the case at issue, the debtor contends that his IRA is excluded from the estate under 11 U.S.C. 541(c)(2) because there is a New Jersey statute which restricts creditors' attachment of IRAs. N.J.S.A. 25:2-l(b) reads:

> b. Notwithstanding the provisions of any other law to the contrary, any property held in a qualifying trust and any distributions from a qualifying trust, regardless of the distribution plan elected for the qualifying trust, shall be exempt from all claims of creditors and shall be excluded from an estate in bankruptcy . . .

The debtor argues that N.J.S.A. 25:2-l(b) constitutes a restriction on the transfer of the interest in the IRA. Because this restriction is enforceable under state law, namely under N.J.S.A. 25:2-1, debtor asserts that the IRA is excluded from the estate under 11 U.S.C. § 541(c)(2). The trustee contends, *inter alia,* that § 541(c)(2) should not be read to exclude a trust from the estate when the only "restriction on transfer" is a restriction on creditors' ability to attach the trust.

A determination of this issue requires the Court to examine closely the language of 11 U.S.C. § 541(c)(2) and N.J.S.A. 25:2-l(b). The first question to resolve is the meaning and scope of the § 541(c)(2) exclusion. The trustee contends that § 541(c)(2) does not operate to exclude automatically from the estate any trust with restricted transferability; rather, he argues, § 541(c)(2) only makes the restriction on transfer enforceable in bankruptcy. The Court disagrees with this theory, as when § 541(c)(2) is read in context of the entire section, it is clear that § 541(c)(2) functions to exclude trusts with restricted transferability from

the estate. In considering § 541(c)(2), courts have construed it as excluding from the bankruptcy estate any trust which contains a transfer restriction. *See Velis v. Kardanis*, 949 F.2d 78 (3d Cir. 1991). Thus we conclude that if the debtor's IRA is subject to an enforceable restriction on transfer, the IRA will be excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2).

The next step in the Court's analysis is a determination of the meaning of a restriction on transfer enforceable under applicable nonbankruptcy law. Specifically, the Court must decide whether N.J.S.A. 25:2-l(b) constitutes such a restriction and thus allows the debtor to exclude the IRA from the bankruptcy estate under 11 U.S.C. § 541(c)(2) It is well-established that the phrase "enforceable under applicable nonbankruptcy law" includes restrictions enforceable under either federal or state law. *Velis v. Kardanis,* 949 F.2d 78 (3d Cir. 1991); *Patterson v. Shumate,* 504 U.S. 753, 759 (1992). Less clearly established, however, is whether a restriction on transfer must be contained in the trust document itself in order to qualify for exclusion from the bankruptcy estate under § 541(c)(2). Focusing on the plain language of § 541(c)(2), the bankruptcy court held that there was no requirement that the restriction on transfer be contained within the trust document. We agree. In *Patterson v. Shumate,* 504 U.S. 753 (1992), the Supreme Court considered the issue of whether an antialienation provision in an ERISA qualified pension plan fell within the § 541(c)(2) exclusion. Because a pension plan must contain an antialienation provision in order to qualify under ERISA, the court did not consider whether § 541(c)(2) requires that the restriction on transfer be contained within the trust document. However, the opinion states:

> The natural reading of this provision entitled

> a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. *Id.* at 758.

This language, taken alone, suggests that the restriction on transfer must be contained in the trust document in order for the trust to be excludable under § 541(c)(2). Taken in context of the *Patterson* case, however, which concerned an ERISA qualified plan, it seems that this language refers to the specific restriction of transfer provisions in ERISA cases, which under federal law must be included in the trust documents. Moreover, neither the plain language of § 541(c)(2) nor its legislative history suggests any requirement that the transfer restriction be contained in the trust document itself. The bankruptcy court undertook a grammatical analysis of § 541(c)(2) and concluded that the words "in a trust" modify the phrase "a beneficial interest of the debtor." We find this reading consistent with the clear language of the statute and affirm the bankruptcy court's holding that the restriction on transfer need not be contained in the trust document for the trust to qualify for exclusion under § 541(c)(2).

A final issue which this Court must consider is whether N.J.S.A. 25:2-1(b) constitutes a restriction on transfer under § 541(c)(2). The trustee argues that § 541(c)(2), which reads "[a] restriction on the transfer of a beneficial interest of the debtor . . ." should be read as "a restriction on the debtor's ability to transfer a beneficial interest of the debtor." Appellant's Brief at 7. In support of this interpretation the trustee advances several policy arguments. While we find many of these policy arguments to be sound, these policy considerations cannot override the plain meaning of the statute, which refers only to "a restriction on

transfer." As the court below concluded, the bankruptcy code defines a restriction on transfer quite broadly:

> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. 11 U.S.C. § 101(54).

N.J.S.A. 25:2-l(b) restricts the ability of creditors to attach a debtor's interest in an IRA. Attachment by a creditor would clearly be a "transfer of interest" and thus, N.J.S.A. 25:2-1(b) is a restriction on transfer.

Although other bankruptcy courts in this district have reached a different resolution of the issues presented by this appeal, we find that Judge Ferguson persuasively stated and applied the law. Under the plain language of 11 U.S.C. § 541(c)(2), a debtor's trust which is subject to any restriction on transfer, the restriction being enforceable under applicable nonbankruptcy law, is excluded from the bankruptcy estate. N.J.S.A. 25:2-l(b) constitutes a state law restriction on transfer of an IRA, thus a debtor may exclude an IRA from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2).

III. CONCLUSION

For the reasons set forth in this Opinion, the Court will affirm the ruling of the bankruptcy court. An appropriate Order will be entered.

Dated: 2-26-96

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 95-5551 (AET)

IN RE RONALD YUHAS,

Debtor.

THOMAS ORR,

Trustee/Appellant,

v

RONALD YUHAS,

Debtor/Appellee.

ORDER

For the reasons set forth in this Court's Opinion filed even date herewith;

It is on this 26th day of February, 1996;

ORDERED that the bankruptcy court's September 29, 1995 ruling in this matter be and hereby is **affirmed**.

s/ Anne E. Thompson
ANNE E. THOMPSON, CHIEF JUDGE

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT, DISTRICT OF NEW JERSEY FILED SEPTEMBER 15, 1995

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Chapter 7

Case No. 95-30368

In Re:

RONALD J. YUHAS

Debtor.

MEMORANDUM OPINION

APPEARANCES:

FOR THE DEBTOR

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Appendix E

FOR THE CHAPTER 7 TRUSTEE

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This matter comes before the court on cross motions to determine whether the Debtor's Individual Retirement Account ("IRA") is property of the bankruptcy estate. The facts presented to the court are essentially undisputed. The Debtor, Ronald J. Yuhas, filed a petition under Chapter 7 of the Bankruptcy Code on January 18, 1995. In his petition, the Debtor listed an IRA valued at $143,000 as personal property. *See*, Debtor's Petition, Schedule B, ¶11. Next to the listing of the IRA was the notation "not property of the estate pursuant to N.J.S.A. 25:2-l(b)." *Id.* Because the Debtor claimed the IRA was excluded from the estate rather than exempted, he elected the federal exemptions. Debtor filed the within motion requesting an order confirming his assertion that the IRA was not property of the estate, and the Trustee cross moved for a declaration to the contrary.

DISCUSSION

The Bankruptcy Code defines property of the estate to include "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541 (a). Neither party disputes that the Debtor's IRA falls within the broad parameters of that definition.

The crux of the controversy is whether the exclusion contained in section 541(c)(2) removes IRAs from the ambit of that definition. Section 541(c)(2) provides that "[a] restriction

on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. §541 (c)(2). Application of the exclusion to a particular asset requires the court to make at least three distinct determinations: 1) does the debtor have a beneficial interest in a trust; 2) is the transfer of that interest restricted; and 3) is the restriction enforceable under applicable nonbankruptcy law.

THE DEBTORS INTEREST IN AN IRA CREATES A BENEFICIAL INTEREST IN A TRUST

The first determination can be dispensed with dispatch, so much so that the parties have not even addressed it. The Bankruptcy Code does not define the term "trust". Generally, a trust consists of "[a]ny arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit." *Black's Law Dictionary* 1508 (6th ed. 1990). The Restatement defines the term as a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of the other person. *Restatement (Second) of Trusts* §2 (1987). More germanely, under N.J.S.A. 25:2-1(b) a qualifying trust is defined as a trust created or qualified and maintained pursuant to federal law, including section 401, 403, 408, or 409 of the Internal Revenue Code. Since the IRA at issue was created pursuant to 26 U.S.C. § 408, it is a qualifying trust under the statute. It is beyond cavil that the IRA was established for the benefit of the Debtor.

Appendix E

THE STATUTE CREATES A RESTRICTION OF TRANSFER

A. Attachment of a debtor's interest by a creditor constitutes a transfer

The next requirement of section 541(c)(2) is that transfer of the corpus of the trust be restricted. The Bankruptcy Code defines transfer as "**every mode**, direct or indirect, absolute or conditional, **voluntary or involuntary**, of disposing **of** or **parting with** property or with **an interest in property** . . . ." 11 U.S.C. §101(54) (emphasis added).

Like the definition of "property of the estate", the definition of the term "transfer" is extremely broad, and has consistently been construed very broadly. *See, e.g., In the Matter of Freedom Group,* 50 F.3d 408 (7th Cir. 1995) ("transfer" is defined broadly; includes issuance of final order of garnishment); *Mellon Bank v. Metro Communications,* 945 F.2d 635 (3d Cir. 1991), cert. denied, 503 U.S. 937 (1992) (Code's definition of "transfer" is sufficiently broad to encompass a leveraged buyout of stockholders by a secured creditor). Most significantly, even the mere docketing of a judgment lien has been held to be a "transfer" under the Bankruptcy Code definition. *In re Babiker,* 180 B.R. 458 (Bankr. E.D. Va. 1995). While the docketing of a lien is not a transfer in the ordinary sense of the word, it falls within the Code's broad definition because it involves the unconditional impairment of a debtor's interest. *See, Barnhill v. Johnson,* 503 U.S. 393 (1992) ("transfer" under the Code occurs when some interest of the debtor is unconditionally shifted).

Given the broad definition of the term "transfer" and the

myriad circumstances under which it has been held to apply, there can be little doubt that attachment by a creditor of a debtor's interest in property constitutes a transfer under the Code. Therefore, if such attachment is restricted under applicable non-bankruptcy law, the second prong of section 541(c)(2) has been met.

B. N.J.S.A. 25:2-1(b) restricts attachment by creditors

The Supreme Court in *Patterson v. Shumate*, 504 U.S. 753 (1992), addressed the question of what law was encompassed in the phrase 'applicable nonbankruptcy law'. The Court held that section 541(c)(2) "contains no limitation on 'applicable nonbankruptcy law' relating to the source of the law." *Id.* at 758. *Cf., Barnhill v. Johnson*, 503 U.S. 393 (1992) (while the definition of "transfer" and when it occurs are matters of federal law, bankruptcy courts must look to state law for the definition of property and interest in property). Thus, any applicable federal or state law may be considered when analyzing the exclusion contained in that section.

N.J.S.A. 25:2-1(b) provides that any property held in a qualifying trust, which as noted earlier includes IRAs by statutory definition, "shall be exempt from the claims of all creditors. . . ." New Jersey law straightforwardly restricts creditor access to funds held in IRAs both inside and outside of bankruptcy.

THE RESTRICTION IS ENFORCEABLE UNDER APPLICABLE NONBANKRUPTCY LAW

A. Applicable nonbankruptcy law is not limited to state spendthrift trusts and ERISA qualified pension plans

Appendix E

The final question to be determined under section 541(c)(2) is whether the restrictions imposed by applicable nonbankruptcy law are enforceable in a case under Title 11. Prior to the Supreme Court's decision in *Patterson*, several courts took the position that Congress intended to limit section 541(c)(2) to restrictions on transfer that are enforceable only under state spendthrift trust law. *See, e.g:, In re Goff*, 706 F.2d 574 (5th Cir. 1983). Although the legislative history makes specific reference to state spendthrift trusts, there is no reason to consider the legislative history when the statute itself is clear. *United States v. Ron Pair Enterprises Inc.*, 489 U.S. 235, 241. When considering section 541(c)(2), the Third Circuit found that it was unreasonable to limit its application to state spendthrift trusts given the clarity of the statutory language. *Velis v. Kardanis*, 949 F.2d 78, 81 (3d Cir. 1991). While there is antecedent case law to the contrary, *Patterson* and *Velis* make clear that 541(c)(2) does not require the creation of a state law spendthrift trust.

Other courts have suggested that a plan must be ERISA qualified in order to be enforceable under section 541(c)(2). *See, e.g., In re Lamb*, 179 B.R. 419 (Bankr. D.N.J. 1994). Yet the language of §541(c)(2) is clear: just as it contains no reference to spendthrift trusts, it contains no reference to ERISA. While the *Patterson* case held that ERISA-required anti-alienation provisions were sufficient restrictions on transfer, it did not limit the source of restrictions to ERISA. There is no statutory or case law requirement that applicable nonbankruptcy law is limited to ERISA regulations.

B. The restriction on transfer need not be contained in the trust document itself

The most interesting question is whether the restriction on

transfer must be contained within the plan or trust at issue in order to be enforceable. *See, e.g., In re Meehan*, 173 B.R. 818, 821 (S.D. Ga. 1994) ("implicit in §541(c)(2) . . . is that the subject restriction is . . . contained in the trust"); *In re Van Nostrand*, 183 B.R. 82, 85 (Bankr. D.N.J. 1995) ("for a restraint on alienation provision to be enforceable pursuant to §541 (c)(2), the provision must be included in the investment plan."); *In re Lamb*, 179 B.R. 419, 423 (Bankr. D.N.J. 1994) ("the Debtor's IRA account does not contain any anti-alienation clause that would place it within the confines of §541(c)(2)").

These decisions gain support from the Supreme Court's statement in *Patterson* that "a debtor's interest in these plans [IRAs] could not be excluded under 541(c)(2) because the plans lack restrictions enforceable under 'applicable non-bankruptcy law' ". 504 U.S. at 762. The Supreme Court noted that in order for a plan to be enforceable under ERISA, it must contain anti-alienation provisions. *Id.* at 760. In other words, the ERISA regulations happen to require that the restrictions appear in the trust document itself. The Court's statement regarding IRAs being excepted from ERISA's anti-alienation provision requirements, appears in the course of a discussion of the different impact of sections 522(d)(10)(E) and 541(c)(2) on several federally established pension plans. The context in which the cited dicta appears does not even suggest that the Court considered all of the ways that transfer of an IRA might be restricted. Conversely, the actual holding in *Patterson* is that §541(c)(2) "entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction under any relevant nonbankruptcy law." *Id.* at 758 (emphasis added).

The court in *In re Meehan*, 173 B.R. 818 (S.D. Ga. 1994),

found that 541(c)(2) requires that the restriction must be contained in the plan or trust at issue, based partly upon the *Patterson* dicta cited, and partly on a perceived tautology created from reading 541(c)(2) otherwise. As the *Meehan* court itself acknowledged, and as set forth above, the *Patterson* dicta cited by the bankruptcy court was "not beyond debate". The tautology employed by *Meehan* as further support of its position is, moreover, self-serving in that it is logically dependent upon application of the clause "in a trust" to modify the term "restriction" rather than the phrase "beneficial interest of a debtor". I respectfully disagree with the application chosen.[1] In my view, the more natural reading of the statutory language is that the restriction that must be enforceable under nonbankruptcy law is a restriction "on the transfer of a beneficial interest of the debtor in a trust".

A recent New Jersey case took this analysis one step further. In *In re Van Nostrand,* 183 B.R. 82 (Bankr. D.N.J. 1995), Chief Judge Gindin concluded that even if a transfer restriction outside of the plan or trust could be applicable, N.J.S.A. 25:2-1(b) does not contain a sufficient restraint on transfer. *Id.* at 85. The *Van Nostrand* court found that the test for exclusion under 541(c)(2)

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1. As is not uncommon, the language of Code is not a model of clarity. Section 541(c)(2) contains four separate prepositional phrases following the word "restriction". The phrase "on the transfer" is closest to, and logically modifies, the word "restriction." The remaining phrases immediately follow the placement of the word "transfer" and, of a piece, describe what may not be transferred, that is, "a beneficial interest of the debtor in a trust." The phrase "in a trust" describes the debtor's interest rather than the restriction.

Filling in the blanks (as did Judge Bowen in *Meehan*) yields the following: "a restriction on transfer . . . enforceable under [N.J.S.A. 25:2-1(b)], is enforceable in a case under this title."

is whether the *debtor* is precluded from transferring an interest in the IRA, not whether creditors can reach the IRA. *Id.* In support of that conclusion, the court cited only *In re Heisey,* 88 B.R. 47 (Bankr. D.N.J. 1988), in which Judge Moore found that because the debtor was entitled to withdraw the IRA funds at anytime, there was no restriction on the transfer of the debtor's interest in a trust. The *Heisey* court specifically rejected the argument that N.J.S.A. 2A:17-50, which made the IRA exempt from levy by judgment creditors, provided the necessary restriction on transfer. Judge Moore rejected that argument not because protection from levy by judgment creditors was insufficient, but because IRAs do not qualify as spendthrift trusts. *Id.* at 50. Post *Patterson*, it is clear that whether a statute creates a spendthrift trust is not determinative of the question of restriction under 541(c)(2). *Patterson* at 761, n.4. Thus, this court most respectfully disagrees with reliance on *Heisey* for the proposition that the appropriate test is debtor access rather than creditor access to the trust.

C. N.J.S.A. 25:2-l(b) creates an enforceable restriction on transfer

Having determined that the transfer restriction need not be in the trust itself, we turn to the language of N.J.S.A. 25:2-l(b) itself to decide if it contains an enforceable restriction on transfer as contemplated by 11 U.S.C. §541 (c)(2). The statute provides that "[a]ny property held in a qualifying trust . . . shall be exempt from all claims of creditors and shall be excluded from an estate in bankruptcy . . . ." N.J. Stat. Ann. 25:2-l(b). The statutory language makes it clear that an IRA is exempt from the claims of creditors. As noted earlier, the Bankruptcy Code defines transfer to include involuntary attachment by creditors. The statute is a duly promulgated law of the state of New Jersey,

which has not been invalidated on constitutional or other grounds.[2] Thus, N.J.S.A. 25:2-1(b) provides the necessary restriction on transfer to bring an IRA within the exception to property of the estate. Accordingly, the Debtor's IRA is not property of the bankruptcy estate pursuant to 11 U.S.C. §541(c)(2).

EXCLUSION FROM THE ESTATE IS CONSISTENT WITH PUBLIC POLICY UNDERLYING THE CODE AND THE CASE LAW

The subsurface current underlying the decisions that deny 541(c)(2) status to self settled trusts seems to be the concern that exempting IRAs from property of the estate will allow people to place assets beyond the reach of their creditors by setting up revocable trusts for their own benefit. There is understandable resistance to the idea that debtors could be permitted to place assets in revocable trusts for their own benefit and thereby insulate them from the claims of creditors.

While this argument has a certain gut-level appeal, it fails to take into consideration that debtors are already permitted that right under New Jersey law. Outside bankruptcy, N.J.S.A.

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2. In his *Van Nostrand* decision, Chief Judge Gindin found that the statute to be an exemption statute rather than an exclusion statute, and on that basis found that it would be unenforceable under the doctrine of federal preemption. Because this court's analysis turns purely on restrictions under the New Jersey law rather than the portions of the statute that attempt to either exempt or exclude property from the estate, the doctrine is not called into play by this analysis. Once it is determined that N.J.S.A. 25:2-1(b) provides a restriction on transfer which removes an IRA from property of the estate, the question of whether the statute purports to be an exclusion or an exemption statute is a red herring.

25:2-1(b) shields any funds in an IRA from the claims of creditors. Debtors in New Jersey are thus already permitted to place assets beyond the reach of creditors by placing them in self-settled trusts.[3] A debtor transferring assets to IRAs for the sole purpose of utilizing N.J.S.A. 25:2-1(b) remains subject to the good faith requirements of the Bankruptcy Code. To that extent, the Bankruptcy Code provides creditors greater protection from abuse than they receive under state law. This concern was squarely addressed by the Third Circuit in *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991), which stated "[p]resumably, substantial or unusual contributions to self-settled trusts made within the preference period or with intent to defraud creditors should receive no protection under either §541(c)(2) or §522 (d)(10)(e)."

Moreover, The United States Supreme Court has consistently held that while federal law defines property of the estate," bankruptcy courts must look to state law for the definition of property and what constitutes and interest in property. *See, Butner v. U.S.*, 440 U.S. 48 (1978); *Barnhill v. Johnson*, 503 U.S. 393 (1992). The concern driving this deference to state law is the idea that the treatment of property interests should be uniform inside and outside of bankruptcy, thus preventing "a party from 'receiving a windfall merely by reason of the happenstance of bankruptcy.' " *Butner* at 55, quoting *Lewis v. Manufacturers National Bank*, 364 U.S. 603,

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3. The case of *Aronsohn & Springstead v. Weissman*, 230 N. J. Super. 63 (App. Div. 1989), cert. den., 117 N.J. 36 (1989) was decided before enactment of N.J.S.A 25:2-1(b), and focussed instead on N.J.S.A. 3B:11-1. The *Aronsohn* court also relied extensively on the very line of cases subsequently rejected by both the Third Circuit in *Velis v. Kardanis* and the Supreme Court in *Patterson v. Shumate*.

609 (1961). If this court were to hold that a creditor could reach an IRA of a debtor in bankruptcy that it would not be entitled to reach under state law, creditors might be encouraged to file involuntary petitions against individuals for the sole purpose of obtaining access to funds unavailable under state law. This most undesirable possibility is precisely the type of result the *Butner* holding seeks to avoid.

Finally, the Third Circuit has recognized the depth of Congressional concern for protection of retirement savings. Although the *Velis* court held that transfer of the debtor's IRA was unrestricted due to that particular debtor's age, the court stated:

> there can be no doubt that Congress has expressed a deep and continuing interest in the preservation of pension plans, and in encouraging retirement savings, as reflected in the statutes which have given us ERISA, Keogh plans and IRAs. We believe it reasonable to conclude that Congress intended to provide protection against the claims of creditors for a person's interest in pension plans, unless vulnerable to challenge as fraudulent conveyances or voidable preferences.

Velis v. Kardanis, 949 F.2d 78, 82 (3d Cir. 1991). Clearly, the Third Circuit is receptive to appropriate legislative attempts to further the important public policy of encouraging and protecting retirement savings.

Appendix E

CONCLUSION

The vagaries of our tax laws are such that when an employee is separated from his or her employer, either voluntarily, involuntarily or when the employer's business terminates, the employee often must roll an ERISA pension or 401K into an IRA or face substantial diminution of his or her retirement fund. Both the Third Circuit and the U.S. Supreme Court have recognized the importance of the various Congressional policies encouraging individuals to save for their retirement. Where statutory definitions and statutory language combine to create a clear pathway accessing that policy, this court feels compelled to follow it. Counsel for the Debtor shall submit a form of order determining that the Debtor's IRA is not property of this estate.

s/ Kathryn C. Ferguson
KATHRYN C. FERGUSON
U.S. Bankruptcy Judge

Dated: September 15, 1995

APPENDIX F — ORDER OF THE UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY FILED SEPTEMBER 29, 1995

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Chapter 7 Case No. 95-30368

In re:

Ronald Yuhas,

Debtor

Date of Oral Argument: August 14, 1995
Judge: Honorable Kathryn C. Ferguson

ORDER GRANTING DEBTOR'S MOTION DECLARING THE INDIVIDUAL RETIREMENT ACCOUNT AS NOT PROPERTY OF THE ESTATE AND DENYING THE CROSS-MOTION OF THE TRUSTEE

This matter having been opened to the Court upon the filing of a motion by the Debtor, by and through his attorneys, seeking a determination that his Individual Retirement Account was not

property of the estate and the trustee, Thomas J. Orr, Esq., having filed a cross-motion seeking to determine the IRA account as property of the estate and the Court having reviewed the briefs of the parties submitted, having heard oral argument and having issued a memorandum opinion filed September 15, 1995 and finding good cause for the entry of the within orders;

It is on this 29th day of September, 1995

ORDERED that the Debtor's motion seeking a determination that his Individual Retirement Account is not property of the bankruptcy estate be and the same hereby is granted; and it is further

ORDERED that the trustee's cross-motion for a declaration that the Individual Retirement Account of the Debtor is property of the estate be and the same hereby is denied; and it is further

ORDERED that the Debtor's Individual Retirement Account valued by the Debtor is his schedule of personal property at one hundred forty three thousand dollars ($143,000.00) be and the same hereby is declared to be not property of the bankruptcy estate consistent with the memorandum opinion filed September 15, 1995.

s/ KATHRYN C. FERGUSON
Kathryn C. Ferguson, U.S.B.J.

APPENDIX G — RELEVANT STATUTES

11 U.S.C. § 541

SUBCHAPTER III—THE ESTATE

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor ant the debtor's spouse in community property as of the commencement of the case that is —

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date —

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property

that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that —

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title;

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made —

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

(c)(l) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law —

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of

the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2594; Pub.L. 98-353, Title II, §§ 363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub.L. 101-508, Title III, § 3007(a)(2), Nov. 5, 1990, 104 Stat. 1388-28; Pub.L. 102-486, Title XXX, § 3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub.L. 103-394, §§ 208(b), 223, October 22, 1994, 108 Stat. 4106.

Appendix G

N.J.S.A. 25:2-1

ARTICLE 1. GENERAL PROVISIONS

25:2-1. Conveyances of personal property in trust for use of persons making them void as to creditors

a. Except as provided in subsection b. of this section, every deed and every conveyance, transfer and assignment of goods, chattels or things in action, made in trust for the use of the person the same, shall be void as against creditors.

b. Notwithstanding the provisions of any other law to the contrary, any property held in a qualifying trust and any distributions from a qualifying trust, regardless of the distribution plan elected for the qualifying trust, shall be exempt from all claims of creditors and shall be excluded from an estate in bankruptcy, except that:

(1) no exemption shall be allowed for any preferences or fraudulent conveyances made in violation of the "Uniform Fraudulent Transfer Act," R.S.25:2-20 et seq., or any other State or federal law; and

(2) no qualifying trust shall be exempt from the claims under any order for child support or spousal support or of an alternate payee under a qualified domestic relations order. However, the interest of any alternate payee under a qualified domestic relations order is exempt from all claims of any creditor of the alternate payee. As used in this paragraph, the terms "alternate payee" and "qualified domestic relations order" have the meanings ascribed to them in section 414(p) of the federal Internal Revenue Code of 1986 (26 U.S.C. § 414(p)).

Appendix G

For purposes of this section, a "qualifying trust" means a trust created or qualified and maintained pursuant to federal law, including, but not iimited to, section 401, 403, 408, or section 409 of the federal Internal Revenue Code of 1986 (26 U.S.C. § 401, 403, 408 or 409).

Amended by L.1993, c. 177 § 1, eff. July 9, 1993.